

**Observations of the United States of America  
on the Human Rights Committee's Draft  
General Comment 35: Article 9**

June 10, 2014

1. The United States Government appreciates the opportunity to respond to draft General Comment 35 regarding Article 9 of the International Covenant on Civil and Political Rights ("the Covenant"), and thanks the Committee for its significant contributions to this project.<sup>1</sup> The United States is firmly committed to carrying out its obligations under the Covenant and under other human rights treaties to which it is Party, and agrees with the Committee that the obligations of States Parties to respect and ensure the right to liberty and security of persons, as set forth in Article 9, provide important protections for persons around the world. It therefore has a strong interest in the Committee's draft and believes that much of the Committee's guidance will help States Parties enhance protections for the liberty and security of persons.
2. The observations of the United States focus on a few key statements in the draft General Comment that, in the view of the United States, should be revised or, in some cases, deleted, from the final text. These include: the scope of the right to security of person under Article 9; the obligations of States Parties with respect to the conduct of non-state actors; the relevance of international humanitarian law to the application of the Covenant; and limitations on a State Party's derogation authority in times of public emergency under Article 4. After addressing these key topics, these observations make a number of specific points, which are illustrative of U.S. concerns rather than a comprehensive catalogue of all points on which the United States may disagree. The United States hopes its views will be useful to the Committee as it finalizes its General Comment on Article 9.

**I. Preliminary Observations**

3. The United States agrees with the Committee's assessment of the profound importance of Article 9 for both individuals and society as a whole, and with its recognition in paragraph 2 of the draft General Comment that "[l]iberty and security of person are precious for their own sake, and also because deprivation of liberty and security of person have historically been principal means for impairing the enjoyment of other rights." It is perhaps because of the historical underpinnings of these rights, grounded in the *Magna Carta Libertatum* in 1215 and the constitutions and bills of rights of so many nations, that these natural and inherent rights were proclaimed with relative ease in Articles 3 and 9 of the Universal Declaration of Human Rights (UDHR) and later, with minimal debate, in Article 9 of the Covenant. Indeed, for the United States, the right of *habeas corpus* is so fundamental to American common law jurisprudence that it was included in the original U. S. Constitution. Among the essential rights included in the 1791 U.S. Bill of Rights -- the first ten amendments to the U.S.

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<sup>1</sup> Draft General Comment No. 35: Article 9, Human Rights Committee, hundred and tenth session, Geneva, March 29, 2010. Available at:

[http://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/CallComments/DGC\\_Article9\\_RighttoLiberty.doc](http://www.ohchr.org/Documents/HRBodies/CCPR/GConArticle9/CallComments/DGC_Article9_RighttoLiberty.doc)

Constitution -- were the right to be secure in one's person against unreasonable search and seizure (including seizure of one's person), the right not to be deprived of life or liberty without due process of law or to be held to answer criminal charges without presentment and indictment before a Grand Jury, the right to be informed of the nature and cause of accusations brought against one, and the guarantee of speedy and public trials by an impartial jury in criminal cases. These rights were later made applicable to U.S. states under the Due Process Clause of the Fourteenth Amendment (with the exception of the right to indictment by Grand Jury). The United States has long maintained robust protections against governmental interference with any of these rights, which is consistent with Article 9 of the Covenant.

4. The United States believes the views of the Committee should be carefully considered by the States Parties. Nevertheless, they are neither primary nor authoritative sources of law and the impression should not be given that they are being cited as such. Thus, the United States encourages the Committee in its final text to refrain from categorical statements regarding State Party obligations unless grounded in and referring to the specific text of the Covenant or other sources of treaty interpretation, rather than being based only on observations and comments of the Committee. The United States has addressed the functions and authorities of the Committee as established in Article 40 of the Covenant and refers the Committee to the U.S. Observations on General Comment 33, transmitted to the Chairman of the Committee on December 23, 2008, and to the U.S. Observations on General Comment 24, transmitted by the United States to the Chairman of the Committee on March 28, 1995.
5. Throughout the draft General Comment, references are made to the application of the Covenant, and Article 9 in particular, to actions outside the territory of a State Party. The United States has made the Committee aware of its position concerning the territorial scope of a State Party's legal obligations under the Covenant: that the Covenant applies only to individuals that are both within the territory of a State Party and subject to its jurisdiction. In the U.S. view, this position is the most consistent with the Covenant's language and negotiating history, and it is in accord with longstanding international legal principles of treaty interpretation. The United States has explained the legal basis for this position on a number of occasions and in considerable detail, including in response to the Committee's General Comment 31 and during dialogues with the Committee in March 1995, July 2006, and March 2014. The United States refers the Committee to the U.S. Observations on General Comment 31, transmitted to the Chairman of the Committee on December 27, 2007, and to these prior dialogues for further information on this point.

## **II. The Relationship between Liberty and Security of Person**

6. The United States generally agrees with the Committee's view in paragraph 7 of the draft General Comment that, within its scope of application,<sup>2</sup> security of person under Article 9 would be jeopardized when a State authority intentionally and unjustifiably inflicts bodily or

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<sup>2</sup> "Within its scope of application" is used throughout to mean both within the territory of a State Party and subject to its jurisdiction (see paragraph 5 above) and in situations not involving the conduct of hostilities or the protection of war victims in which the law of armed conflict, as the *lex specialis*, would be the controlling body of law (see Part IV below).

mental injury on an individual. However, the extent of a State Party's obligation pursuant to the Covenant to protect security of persons outside the context of deprivation of liberty is unclear.

7. The ordinary meaning and context of the language in Article 9 supports the conclusion that the right to liberty and security of person, for purposes of Article 9, pertains to situations involving deprivation of liberty.<sup>3</sup> The first sentence of paragraph 1 proclaims the general principle that everyone has the right to liberty and security of person. The second and third sentences specify that a State Party violates the right to liberty and security of person when it arbitrarily arrests or detains an individual or unlawfully deprives a person of liberty. The additional paragraphs of Article 9 set forth in further detail the procedural protections and remedies that States Parties are obligated to provide to ensure the right to liberty and security is respected in these circumstances. It is thus apparent from the plain language of Article 9 that "security of person" in Article 9(1) was thought of in relation to a deprivation of liberty.<sup>4</sup>
8. The standards used in the text of Article 9 -- arbitrary and unlawful -- are set forth only in relation to arrest, detention, and deprivation of liberty. Other articles of the Covenant that provide for security of persons more broadly adopt specific relevant standards, e.g., Article 6 provides that "no one shall be arbitrarily deprived of his life" and Article 7 creates a threshold of "cruel, inhuman or degrading treatment." There is nothing comparable in Article 9 to address justifiable actions that may infringe on the security of a person (such as self-defense or other action in the face of imminent threat to others) beyond the context of deprivation of liberty.

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<sup>3</sup> Given the ordinary meaning and context of the terms of Article 9, there is no need to look to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion; however examination of that preparatory work also reveals an absence of evidence to support a broader scope. The original text of the article considered by the Human Rights Commission pertained solely to detention (*See* Report of the Commission on Human Rights, Second Session, E/600, Annex B, December 17, 1947). It was not until the 8<sup>th</sup> session of the Human Rights Commission in 1952, five years into the negotiation of the provision, that the United Kingdom first proposed adding the first sentence to Article 9(1): "Everyone has the right to liberty and security of person" (E/CN.4/L.137), and Poland included it later in the Session (E/CN.4/L.183), the form in which it was adopted by the Commission. (*See* E/CN.4/SR/ 314.) Debate on Article 9 thereafter continued to focus on how the article would apply in different situations of arrest and detention and the substantive and procedural obligations that would give effect and meaning to the right to liberty and security of persons during arrest or detention. (*See generally* A/4045, Report of the Third Committee in adopting Article 9 among other articles, pp. 11-22 (9 December 1958) and related summary records, A/C.3/SR.861-866 (23-29 October 1958); *see also* A/2929, Draft International Covenants on Human Rights, Annotation prepared by the Secretary-General, pages 98-103 (1 July 1955) and related summary records E/CN.4/SR 313-314 (10-11 June 1952).) Thus the re-articulation of the UDHR right did not alter the focus of the article text, other than to combine a guarantee and considerations of security with the substantive and procedural guarantees required to ensure that an arrest or detention is neither arbitrary nor unlawful.

<sup>4</sup> A broader right to security of person is guaranteed in related articles of the Covenant; there is thus no need to read this right more broadly into Article 9, when the text of that article does not provide any further elaboration of that right. As discussed in paragraphs 53-61 of the draft General Comment, the procedural and substantive guarantees of Article 9 overlap and interact with other articles of the Covenant that further guarantee the security of person, notably Articles 6-10 and perhaps indirectly Article 14. Indeed, Article 10 was clearly intended to complement Article 9 in setting forth the procedural and substantive requirements with particular attention to both accused and convicted persons to ensure that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."

9. Thus, in finalizing the text of the draft General Comment (and related paragraphs throughout), the United States recommends that the Committee focus on the right to security in the context of arrest or detention, such as instances of excessive use of force by law enforcement personnel in stopping, seizing, arresting and ultimately detaining individuals (as noted in draft paragraph 7) or extreme forms of arbitrary detention that are themselves life-threatening (as noted in draft paragraph 55).

### **III. Regulating Conduct of Non-State Actors**

10. The United States agrees with paragraph 9 of the draft General Comment that a State Party is required under the Covenant to exercise responsibility for the conduct of private individuals or entities in situations where the State Party authorizes private individuals or entities to exercise governmental powers of arrest or detention. This would include responsibility to ensure that appropriate steps are taken to prevent violations and provide for effective remedial measures contemplated by both Articles 2 and 9 whenever a private individual or entity is authorized to exercise such powers and the circumstances in the particular case warrant. The United States disagrees, however, with the Committee's imputing affirmative obligations to States Parties to prevent, regulate, or punish the non-governmental conduct of private actors. The ordinary meaning of the text of the Covenant does not support such a reading, and there is no indication in the negotiating history of any agreement to impose obligations to prevent security threats or arbitrary and unlawful arrest and detention other than under governmental authority.
11. A human rights violation generally entails state action, and therefore the Article 2 obligation to take the necessary steps to give effect to such a right is primarily in relation to governmental acts. Thus, absent any provision that clearly and specifically imposes an obligation on States Parties to prevent or regulate particular kinds of misconduct by private parties or non-state actors (such as the obligation under Article 8 to prohibit slavery), Article 2 creates no general obligation to do so. Article 2 contains no language stating that Covenant obligations extend generally to private, non-governmental acts, and no such obligation can be inferred. *See* U.S. Observations on General Comment 31. Nor does Article 9 contain any language specifically requiring States Parties to regulate the non-governmental conduct of non-state actors in relation to the liberty and security of persons.
12. The draft General Comment offers no legal basis for the assertions in paragraphs 7-8 and elsewhere throughout the draft that States Parties have Covenant obligations to take measures to deal with threats of death or injury by private actors, whether in situations involving an individual victim or patterns of violence directed at categories of victims, including violence against women and children. Nor does any textual or other support exist for asserting obligations under Article 9 (or the Covenant more generally) to protect individuals "against abduction or detention by individual criminals or irregular groups, including armed or terrorist groups, operating within their territory," or against wrongful deprivation of liberty by lawful private organizations (be they private employers, schools, or hospitals) -- unless such organizations are operated by governmental authorities or their conduct can otherwise be imputed to the government. The draft refers exclusively to previous concluding observations and opinions of the Human Rights Committee as support for these assertions.

13. If the Committee is inferring such obligations solely from the restatement in Article 9 of the inherent right to liberty and security of persons set out in UDHR Article 3, the United States would note that the Third Committee of the General Assembly rejected an amendment to the UDHR that would have added to that Article the following: “The State should ensure the protection of each individual against criminal attempts on his person.” This proposal was presented and rejected immediately prior to the final vote on Article 3 in the Third Committee of the General Assembly in 1948<sup>5</sup> and nothing comparable was pursued during negotiation of the Covenant.
14. The absence of language in the Covenant imposing a duty or obligation on the part of the State Party to prevent crimes or other conduct by non-state actors is significant when contrasted with the text of other international conventions that specifically impose such obligations upon States Parties to prevent certain types of misconduct by non-state actors in limited circumstances. For instance, as noted in the U.S. Observations on General Comment 31, both the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)<sup>6</sup> and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) contain provisions that impose obligations upon States Parties to prevent discrimination “by any persons, group or organization”<sup>7</sup> and “by any person, organization or enterprise.”<sup>8</sup> Similarly, under Article 4(1)(e) of the Convention on the Rights of Persons with Disabilities (CRPD), States Parties undertake “to take all appropriate measures to eliminate discrimination on the basis of disability by any person, organization or private enterprise.”
15. Some States have chosen to assume affirmative treaty obligations regarding non-state actors in those States’ efforts to prevent, punish and eradicate violence against women by becoming parties to such regional conventions as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (“Convention of Belem do Para”) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (“COE Convention”). Both require States Parties to take a number of

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<sup>5</sup> A/C.3/SR.107 (19 October 1948). The USSR presented this amendment to UDHR Article 3 citing a pattern of racial lynching in the American South at that time. Although it was originally introduced in reference to the right to life, the representative of the USSR clarified during the debate that it would modify all three rights contained in Article 3. The sentence was rejected 26:10 with 9 abstentions.

<sup>6</sup> The United States ratified the CERD with a reservation that it did not accept any obligation to enact legislation or take other measures with respect to private conduct except as mandated by the Constitution and laws of the United States.

<sup>7</sup> CERD, Article 2(1)(d), providing that States Parties undertake to “prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization.”

<sup>8</sup> CEDAW, Article 2(e), providing that States Parties undertake “[t]o take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise.”

affirmative steps to prevent, investigate, punish and remedy acts of violence against women, including a “due diligence” obligation in each with respect to private conduct.<sup>9</sup>

16. In addition, many States have taken on obligations with respect to conduct of private parties in the counter-terrorism context. The international community has elaborated 14 universal legal instruments and four amendments since 1963 to prevent various kinds of terrorist acts.<sup>10</sup> Under these treaties, States Parties assume comprehensive obligations to criminalize, prevent, and prosecute or extradite crimes that directly threaten the liberty and/or security of persons in specific transnational contexts. These various counter-terrorism obligations require the suppression of unlawful acts of violence against aircrafts, airports, and maritime safety, and suppression of hijacking, hostage-taking, and crimes against internationally protected persons. More recently, crime control initiatives under the 2000 United Nations Convention against Transnational Organized Crime have included protocols to combat human trafficking, the smuggling of migrants, and illicit manufacturing of and trafficking in firearms.<sup>11</sup>
17. That the CERD, CEDAW, CRPD, Convention of Belem do Para, COE Convention and other conventions include provisions explicitly creating State obligations requiring the regulation of conduct by private actors demonstrates that when treaty drafters intend for state obligations to include the regulation of private conduct, they explicitly impose such obligations, allowing States to decide whether or not to undertake international obligations on these subjects. The absence of any language to this effect in Article 9 or Article 2 of the Covenant reflects a decision by the drafters not to reach such conduct.
18. Although the United States appreciates that several of these recommendations are already framed as such (“should”), it strongly encourages the Committee to refrain from assertions that States Parties are “obliged” or “must” take measures against private conduct or threats when there is no legal basis in the Covenant for such interpretations.

#### **IV. The Law of Armed Conflict**

19. In all situations of armed conflict, the United States is deeply committed to complying with its obligations under the law of armed conflict (also referred to as international humanitarian law or the law of war). However, the United States does not agree with the analysis or conclusions set forth in several paragraphs of the draft General Comment regarding the applicability of Article 9 in situations of armed conflict.
20. As an initial matter, the statement in paragraph 63 that “Article 9 applies . . . in situations of armed conflict to which the rules of international humanitarian law are applicable” is overly broad. As explained in the U.S. Observations on General Comment 31: “While the United States agrees with the Committee that as a general matter armed conflict does not suspend or

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<sup>9</sup> Convention of Belem do Para, Article 7(b) and (g); COE Convention, Article 5(2).

<sup>10</sup> <http://www.un.org/en/terrorism/instruments.shtml>

<sup>11</sup> <http://www.unodc.org/unodc/en/treaties/index.html?ref=menuaside>

terminate a State's obligations under the Covenant within its scope of application, its assertion that the Covenant invariably applies in situations of armed conflict to which the rules of international humanitarian law are applicable sweeps too broadly." While the United States acknowledges that difficult questions arise regarding the applicability of international human rights law in situations of armed conflict, the draft does not accord sufficient weight to the well-established principle that international humanitarian law, as the *lex specialis* of armed conflict, is the controlling body of law with regard to the conduct of hostilities and the protection of war victims.

21. In particular, several paragraphs incorrectly imply that international humanitarian law does not provide the *lex specialis* in non-international armed conflicts. For example, after acknowledging that international humanitarian law applies in the context of an international armed conflict, paragraphs 15 and 65 appear to rule out the applicability of international humanitarian law in non-international armed conflicts. Although identifying the international law rules that apply to particular government action in the context of an armed conflict is a highly fact-specific inquiry, international humanitarian law is the *lex specialis* in both international and non-international armed conflicts, including with respect to detention of enemy combatants in the context of the armed conflict. Deleting the word "international" before "armed conflict" in paragraphs 15 and 65 would effectively address this issue.
22. Given that international humanitarian law is the controlling body of law in armed conflict with regard to the conduct of hostilities and the protection of war victims, the United States does not interpret references to "detainees" and "detention" in several paragraphs to refer to government action in the context of and associated with an armed conflict. For example, paragraph 15 incorrectly implies that the detention of enemy combatants in the context of a non-international armed conflict "would normally amount to arbitrary detention as other effective measures addressing the threat, including the criminal justice system, would be available." On the contrary, in both international and non-international armed conflicts, a State may detain enemy combatants consistent with the law of armed conflict until the end of hostilities. Similarly, to the extent paragraphs 15 and 66 are intended to address law-of-war detention in situations of armed conflict, it would be incorrect to state that there is a "right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention" in all cases. In addition, to the extent the discussion of an individual right to compensation under Article 9 in paragraphs 49-52 is intended to extend to individuals detained in the context of an armed conflict, as a matter of international law, the rules governing available remedies for unlawful detention in the context of an armed conflict would be drawn from international humanitarian law. Relatedly, paragraph 31 and accompanying footnote 11, in references to "military prosecutions" and "military courts," do not distinguish between different types of military prosecutions. For example, there may be a distinction between military tribunal proceedings under the law of war and courts-martial proceedings against service members, given that international humanitarian law is the *lex specialis* in situations of armed conflict.
23. Those portions of paragraphs 63-67 and other paragraphs throughout the General Comment that address the applicability of Article 9 in situations of armed conflict should be revised

substantially to reflect appropriately the principle of *lex specialis*, or should be eliminated from the draft.

## **V. Derogation under Article 4**

24. The United States also has concerns regarding the draft General Comment's treatment of derogation from Article 9. As the Committee notes, Article 9 is not included in the list of non-derogable rights in Article 4(2), but Article 4(1) requires that any derogation must be "strictly required by the exigencies of the situation" and must not be inconsistent with a State's other obligations under international law. The United States agrees with the Committee's statement in General Comment 29 (paragraph 11) that this limitation in Article 4(1) means that "[s]tates parties may in no circumstances invoke Article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law." But the United States does not agree with the Committee's statement in paragraph 65 that "the fundamental guarantee against arbitrary detention would be non-derogable" on this basis. The only cited authority for this sweeping statement is a footnote reference to paragraph 11 of General Comment 29 which refers to "arbitrary deprivation of liberty" as either a peremptory norm, violation of international humanitarian law, or both, without any elaboration or authority. The United States does not believe that a "fundamental guarantee against arbitrary detention" is considered a peremptory norm. The United States also notes that, as discussed in paragraph 21, international humanitarian law provides the *lex specialis* in non-international armed conflicts as well as international armed conflicts, and that as a general matter derogation would only be relevant as to action within the Covenant's scope of application.
25. Nor can the United States support the sweeping statement in paragraph 64 that "prohibitions against taking of hostages, abductions or unacknowledged detention are . . . not subject to derogation" because they would necessarily violate international law. The only cited support for this statement is a prior statement by the Committee. The United States believes that the authority under Article 4 to derogate from the specific prohibitions contained in Article 9 – which does not use the terms "hostages, abductions or unacknowledged detention" – is not, as a strictly legal matter, constrained in this manner, but agrees that once a State Party has derogated, measures taken must be consistent with the State Party's other obligations under international law, to include specific treaty obligations, customary international law and peremptory norms.
26. In addition, the United States agrees that the duration of any derogating measure must be strictly constrained by the exigencies of the situation. But it cannot accept the view expressed in paragraph 65 that in determining that a derogating measure is "strictly required by the exigencies of the situation" within the meaning of Article 4(1), the derogating State Party is constrained by a requirement of "strict necessity or proportionality" for any derogating measures involving security detention. Nor can it accept the view that any such measures must be accompanied by procedures that the Committee considers necessary to prevent arbitrary application of measures involving security detentions, such as "review by a court or an equivalent independent and impartial tribunal." First, the United States does not recognize that "strict necessity or proportionality" is the correct standard or that such



procedures are necessarily required to prevent arbitrary detention under Article 9, even in the absence of derogation (see paragraph 31 below). Additionally, if the Covenant negotiators had intended for such requirements to apply, they would have added specific language so providing in the text of either Article 4(1) or (2).

27. Furthermore, the assertion in paragraph 66 (citing paragraph 6 of General Comment 32) that “[t]he procedural guarantees protecting liberty of person may never be made subject to measures of derogation that would circumvent the protection of non-derogable rights” is not supported by the ordinary meaning of the text of Article 4. The United States agrees that a derogating State Party would need to ensure compliance with all other international obligations, including the provisions of the Covenant not subject to derogation and, in so doing, carefully weigh the impact of any derogating measure on its ability to do so. But Article 4(2) clearly defines which articles are non-derogable. All other articles are thus derogable, to the extent authorized by Article 4. The Committee has not identified a general “non-circumvention obligation” either in the Covenant or elsewhere, nor does it indicate what would constitute circumvention. It is therefore within the discretion of a derogating State Party to determine how best to meet any related obligations without reliance on derogated measures.
28. As a practical matter, the United States has never declared a public emergency within the meaning of Article 4 or availed itself of the right of derogation under its terms. It is in fact highly unlikely that the United States would ever do so. There is no authority under the U.S. Constitution to suspend any of the Constitutional rights that parallel Covenant rights, with the sole exception of the authority under Article I, Section 9, to suspend the Writ of *Habeas Corpus* “when in Cases of Rebellion or Invasion the public Safety may require it.” The United States shares the Committee’s laudable objective of discouraging derogation of Covenant rights and freedoms to the extent possible. But it believes the text of Article 4 is sufficient for this purpose and that in defining States Parties’ obligations under the Covenant, the draft General Comment needs to remain true to that text.

## **VI. Additional Observations**

29. The draft General Comment highlights in paragraph 5 examples of what the Committee considers to be deprivation of liberty. The United States generally agrees with these examples, whenever such deprivation of liberty involves governmental or judicial action, as distinguished from private actions by non-state actors (as explained in Part III above), and is undertaken within the Covenant’s scope of application. The United States notes, however, that there are inevitable differences in domestic legal frameworks and States Parties may regulate measures such as solitary confinement and the use of restraint devices differently, e.g., as conditions of detention distinct from the decision to detain, or the use of monitoring devices as alternatives to custody, as contemplated, for example, under Article 9(3).<sup>12</sup> The

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<sup>12</sup> There is an important distinction under U.S. jurisprudence between imposition/length of sentence and conditions of confinement. For example, federal *habeas corpus* litigation mainly considers challenges to the imposition or length of the sentence, as opposed to conditions of confinement. While some courts may consider conditions of confinement claims under federal *habeas* law, it is more common that inmates challenging placement in restricted housing or use of restraints would do so by pursuing other litigation seeking injunctive relief or monetary damages

United States, therefore, recommends that the General Comment be less categorical in characterizing such restrictions on the same footing as deprivation of liberty.<sup>13</sup>

30. The United States notes some imprecision with respect to references to deprivation of liberty in relation to education in school. For example, while paragraph 5 of the draft General Comment correctly describes “institutional custody of children” as a form of deprivation of liberty and paragraph 8 makes reference to “wrongful deprivation of liberty by . . . schools,” paragraph 40 refers to the right of *habeas corpus* applying to “detention of children for educational purposes.” It would be helpful if the General Comment were to clarify, as it has, for example, with respect to military service at the end of paragraph 5, that in the context of compulsory education restrictions on a student may not amount to deprivations of liberty if they do not exceed the requirements of normal compulsory education or deviate from the normal experiences of children within the schools of the State Party concerned.
31. As to the Committee’s views in paragraphs 12 on the meaning of “arbitrary” under Article 9(1) (and elements drawn from those views in paragraphs 15, 18, 19, 21, 65 and 66, in particular), the United States agrees that there may be circumstances in which a lawful detention could be arbitrary, particularly where the law itself is unjust. It also shares the Committee’s objective that any detention decision be reasonable and appropriate, while also recognizing that such decisions are normally discretionary, whether entrusted to a judicial authority or to an administrative authority within the domestic legal framework of a State Party. The United States disagrees, however, that “arbitrary” somehow encompasses the concepts of “necessity” or “proportionality.” Neither the text nor travaux for Article 9 of the Covenant indicates that detention has to be strictly necessary to achieve a legitimate aim or somehow proportionate to the aim to satisfy this criterion. The prohibition on arbitrariness is not the same as a requirement that a measure be *necessary* to achieve a particular government aim and does not impose a requirement to choose a less restrictive alternative measure whenever available to address a given threat or purpose. Nor is there any suggestion in the text or the negotiating history that by prohibiting arbitrary detention the intent was to prescribe additional procedural requirements (comparable to those required for persons charged with crimes) or judicial, administrative or independent review beyond those established by law within the domestic legal framework of the State Party.<sup>14</sup> The United

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on constitutional grounds, basing the actions on alleged violations of the Due Process Clause or the Eighth Amendment.

<sup>13</sup> It is further recalled that most of the examples of deprivation of liberty enumerated by the Committee (but not the conditions of detention identified in paragraph 5) generally conform to various listings considered by the Covenant negotiators during the negotiation of Article 9(1), but the negotiators ultimately chose not to try to enumerate specific forms of detention, either as exception to the general prohibition or examples of permissible detention, out of doubt that any such enumeration could be complete or acceptable to all countries. (See, e.g., A/4045, Report of the Third Committee in adopting Article 9 (among other articles), para. 43 (9 December 1958) and related summary records, A/C.3/SR.861-866 (23-29 October 1958); see also A/2929, Annotation prepared by the Secretary-General of text of the draft Covenant articles, as adopted by the Human Rights Commission, page 99, para. 28 (1 July 1955) and related summary records E/CN.4/SR 313-314 (10-11 June 1952).)

<sup>14</sup> Inclusion of the criterion “arbitrary” was the most contentious issue throughout the decade-long negotiation of Article 9. The consensus of members of the Third Committee at the time of its adoption in 1958 was that Article 9 needed to be drafted “with precision while taking into account the diversity of national laws and procedures.” Thus

States also does not agree with the categorical assertion that any decision to keep a person in detention would necessarily be arbitrary “if it is not subject to periodic reevaluation of the justification for continuing the detention.” The need for periodic review of a decision to exercise legal authority to detain would largely depend on the nature and purpose of the detention and the likelihood that the relevant circumstances could change. Of course, the legal justification of any detention would need to be subject to review through a *habeas* or other legal challenge, as required under Article 9(4).

32. The United States has some concerns with the Committee’s conclusions in paragraphs 14 and 15 of the draft General Comment. First, it is unclear what the following sentence in paragraph 14 is meant to address: “The [non-criminal] regime must not amount to an evasion of the limits on the criminal justice system by providing the equivalent of criminal punishment without the applicable protections.” In addition, there is no basis for the categorical statement in paragraph 15 that security or administrative detention would “normally” be considered arbitrary if other effective measures such as criminal prosecution are available to deal with a threat. If a lawful basis for detaining an individual exists that is unrelated to criminal prosecution, the United States would not regard the exercise of such detention authority to be either an evasion of criminal process or arbitrary, simply because there might also be grounds to pursue a criminal prosecution instead. There is no requirement - and it is not feasible - to prosecute every criminal offense for which there is legal ground. The exercise of prosecutorial discretion is essential to rationalize resources and priorities. Moreover, even where there may be a legal basis to prosecute, the interests of justice, legitimate government objectives, and even the interests of the individual, may be better served through use of other lawful authorities.
33. Further in the discussion of security detention under paragraph 15, and again bearing in mind the Covenant’s scope of application, the draft General Comment refers to the need to fully respect the guarantees provided for by Article 9 in all cases. The Committee should make clear that this only refers to the relevant guarantees provided in paragraphs 1, 2, 4 and 5 of Article 9 or simply refer to relevant or applicable guarantees, given that paragraph 3 is only applicable to persons criminally charged. The Committee’s recommendations on appropriate guarantees concerning duration, prompt and regular review by a court or other independent

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specific provisions were made for judicial review of the lawfulness of any deprivation of liberty and for the exercise of judicial power and discretion specifically in cases of arrest and detention on a criminal charge, but the substantive grounds and procedures to be followed for all other forms of detention in non-criminal cases were left to be established by the laws of each State Party, so long as such laws are not themselves arbitrary. As explained by the Report of the Third Committee upon its adoption in 1958, “[t]he reason for introducing the criterion of arbitrariness in the second sentence was that legal grounds and procedures or the criterion of legality set out in the third sentence [of Article 9(1)] might themselves be open to question on the grounds of arbitrariness” and that the Committee “should not reject a term which was legally valid and commonly used in many Countries and their courts.” Those who opposed the criterion of arbitrariness felt it redundant of the first and third sentences of paragraph (1), meaning only “without legal grounds” or “contrary to the law.” Others, however, “considered that ‘arbitrary’ meant not only ‘illegal’ but also ‘unjust,’ and incompatible with the principles of justice or with the dignity of the human person.” It was regarded as “a safeguard against the injustices of States.” In the view of the Third Committee: “[a]n arbitrary act was any act which violated justice, reason or legislation, or was done according to some one’s will or discretion, or which was capricious, despotic, imperious, tyrannical or uncontrolled.” (See A/4045 (9 December 1958), at paras. 46-49.)

and impartial tribunal, access to legal counsel of choice, and disclosure of evidence are all reasonable and useful for States Parties to consider, although not strictly required by the Covenant in the absence of criminal charges. The standard for the length of detention, (“absolutely necessary”) seems overly restrictive, however, and might more appropriately be “reasonably necessary” or simply “necessary.” Moreover, there is no textual support for the suggestion in paragraph 15 that Article 9 would allow administrative detention only in circumstances in which an individual poses a “present, direct and imperative threat.” Rather, Article 9 leaves to States Parties the ability to develop standards for such detention consistent with Article 9 and their domestic legal frameworks. Further, the requirement that the burden of proof on States Parties “increases with the length of the detention” does not appear to be grounded in the text of Article 9 (for the reasons stated in paragraphs 31 above).

34. Also as noted in paragraph 31 above, the United States does not agree with the view restated in paragraph 18 that Article 9 requires individualized or periodic review for every type of deprivation of liberty, including immigration detention. Rather, the text leaves to individual States Parties to decide the appropriate legal framework within their own constitutions and laws to give effect to and implement these rights.<sup>15</sup> This is not to say that duration limitations, individualized determinations, and reassessments over time would not be reasonable and appropriate recommendations for States Parties to consider, to the extent they are legally available and appropriate in individual circumstances. But, these would be better cast as recommended best practices rather than as requirements under Article 9.
35. The United States is similarly concerned with the Committee’s reliance on a “necessary and proportionate” requirement in paragraph 19 in relation to the commitment and care of the mentally ill. This is not the correct standard for judging arbitrariness under Article 9 for the reasons stated in paragraph 31 above. The U.S. Supreme Court has repeatedly recognized that “civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protections.”<sup>16</sup> There are ample opportunities in the United States for those involuntarily committed to challenge the lawfulness of a commitment order through *habeas corpus* proceedings and to challenge the conditions of confinement through either injunctive or civil damage suits. Nothing in the Covenant suggests that the standard in such cases is required to be “necessary and proportionate.”

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<sup>15</sup> For, example, a non-U.S. citizen subject to mandatory detention pending immigration removal under 8 U.S.C. 1226(c) for having committed certain criminal offenses can challenge whether he or she is properly subject to mandatory detention, but if an Immigration Judge decides that 1226(c) applies, that individual will not receive periodic re-evaluation of the justification for continuing detention. The constitutionality of such provisions on due process or other grounds may always be reviewed by the courts (in fact, there is currently active litigation in several U.S. courts with respect to 8 U.S.C. 1226(c)). It is through such process that a State Party’s obligations under Article 9 are met.

<sup>16</sup> While due process protections for civil commitment hearings may vary from state to state in the United States, landmark U.S. Supreme Court cases have clarified due process protections that must be afforded to persons facing potential civil commitment. The Supreme Court has repeatedly recognized that “civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection.” *Addington v. Texas*, 441 U.S. 418, 425 (1979). State laws generally have adopted heightened due process protections for persons with such disabilities facing deprivations of their liberty, although differences remain.

36. It is also not clear what the Committee means in paragraph 21 by “civil preventive detention” after serving a criminal sentence and whether it includes civil commitment proceedings for mental illness or also immigration detention pending removal. For example, the United States Government may detain individuals either in lieu of a criminal sentence (if not guilty by reason of insanity) or post-sentence in the case of a person found to be dangerous or a sexual predator as a result of a mental illness or defect. *See* 18 U.S.C. §§ 4241-4247. Although each commitment requires a hearing before a Federal court, and is subject to further review if there is a change in mental health status, there are no “regular periodic reviews by an independent body,” as the draft General Comment says is required. Individual U.S. states have analogous provisions and procedures. Although U.S. practice comports with some of the measures that the Committee considers to be required, the Committee’s views should be framed as recommended practices rather than in obligatory terms, since they are not grounded in any of the textual requirements under Article 9, and it should be left to States Parties to decide how best to pursue such recommendations within their domestic legal frameworks and within the circumstances of a given case.<sup>17</sup>
37. The United States agrees with the principal conclusions in paragraph 23 that any deprivation of liberty must be on grounds established by law and in accordance with procedures established by law; that this requires the existence of laws and procedure in order to establish lawfulness for both *habeas corpus* and compensation purposes; and that any person arrested, regardless of the filing of charges, must be informed of the reasons at the time of arrest and promptly thereafter of any charges. The remaining categories of information specified in this and subsequent paragraphs as required to be provided, however, represent desirable best practices for States Parties to consider, but are not explicitly required by the terms of Article 9. These should be modified to reflect their advisory nature.
38. With respect to paragraphs 32 and 33, the United States generally agrees that 48 hours would ordinarily be a reasonable standard for assessing promptness in bringing an arrested person before a court or judicial authority for purposes of Article 9(3), recognizing that this requirement applies solely to detention based on criminal charges. However, Article 9(3) refrains from setting any strict time-limits beyond “promptly.” Therefore, the United States would urge the Committee not to be categorical in imposing a 48-hour limit, even allowing for exceptional circumstances. This would be better framed as a recommended best practice rather than a firm rule.<sup>18</sup>
39. The United States believes the Committee’s views in paragraph 34 are not grounded in the text of the Covenant insofar as they mandate that an individual be brought physically before a judge or authorized judicial officer. It is not clear whether this paragraph is addressing Article 9(3) or 9(4), but neither paragraph contains such an explicit requirement. With

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<sup>17</sup> For example, to the extent that the Committee intends its guidance to pertain to immigration detention pending removal, the Committee’s view requiring detention conditions “aimed at rehabilitation and reintegration into society” do not seem appropriate to the circumstances or purpose of detention.

<sup>18</sup> For example, although the U.S. federal rules set a standard of “without unnecessary delay,” the U.S. Supreme Court has held that it generally cannot be more than 48 hours, *see County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), and that would apply at both the federal and state level. Indeed some U.S. states may apply more stringent statutory or constitutional requirements to bar detention for even that length of time.

respect to Article 9(3), for example, the United States guarantees a Constitutional right to appear, which generally may be waived. In the course of *habeas* proceedings, however, a court in the United States may order the presence of the individual. The United States, therefore, recommends that paragraph 34 be framed as a recommendation rather than a legal requirement.

40. The United States disagrees with statements in paragraph 38 that “[t]he second sentence of Paragraph 3 requires that detention in custody of persons awaiting trial shall be the exception rather than the rule” and that “[c]ourts must examine whether alternatives to pretrial detention, such as bail, electronic bracelets, or other conditions, would render detention unnecessary in the particular case.” Paragraph 3 is carefully drafted to be neutral on this issue, both by removing any presumption in favor of detention in custody and in authorizing (but not requiring) the consideration of alternatives so as to permit conditional release in appropriate cases.<sup>19</sup> As with other provisions of Article 9, these are matters left to the discretion of the competent judicial authority under the domestic legal regimes of individual States. The United States also disagrees with the categorical statement in paragraph 38 that “a similar requirement results from the prohibition of arbitrary detention in paragraph 1” (in other words, in all cases of detention other than for criminal prosecution). Such a requirement cannot reasonably be read into the Covenant’s text, which simply prohibits arbitrary arrest and detention (as discussed in paragraph 31 above). Conditional release alternatives may not even be appropriate to all detention categories. Moreover, the negotiators clearly drafted paragraph 3 to apply only to pretrial detention pending trial; this specific framework cannot be undone by reference to “arbitrary” in paragraph 1. The paragraph should accordingly be reframed as a recommendation in a manner that would conform to the Covenant text.
41. With respect to paragraph 40 of the draft General Comment, the United States generally agrees that the right under Article 9(4) to challenge the legality of detention before a court through *habeas corpus* proceedings or other means applies to any form of detention “by official action or pursuant to official authorization” with the proviso that any such detention occurs within the scope of application of the Covenant. The United States recommends, however, for the reasons explained in paragraph 29 above, that the General Comment be less categorical with respect to conditions of detention, such as solitary confinement and the use of restraint devices.
42. The issue addressed in paragraph 43 regarding entitlement to pursue a succession of *habeas* proceedings after “an appropriate period of time” finds no support in the text of Article 9(4) and would at best be a recommendation better left for domestic legal processes to address. This may not be the practice in many countries. Passage of time alone without any change in circumstances would not in itself justify re-litigation of the legal basis for detention.
43. For the reasons detailed in the U.S. Observations on General Comment 31, the United States disagrees with the assertion in paragraph 57 that: “Returning an individual to a country where

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<sup>19</sup> The Report of the Third Committee upon its adoption in 1958 states: “The second sentence of the existing text should be maintained because it did not regulate the system of provisional release but simply indicated that it should not be the general rule to hold an accused person in custody.” (See A/4045, para. 57 (9 December 1958).)

a real risk of a severe violation of liberty or security of person such as prolonged arbitrary detention exists may amount to inhuman treatment prohibited by article 7 of the Covenant.”

44. The United States Government concludes these Observations with a statement of its appreciation for the work of the Human Rights Committee. The United States fully appreciates the Committee’s continuing efforts to advise States Parties on issues related to their implementation of the treaty and looks forward to its continuing dialogue with the Committee on these issues.

